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Supreme Judicial Court
John Adams Courthouse
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Re: <u>Boston Bar Association Comments on the Proposed Revisions to the Code of Judicial Conduct-Canon 3B(9)</u>

Dear Ms. Berenson:

On behalf of the Boston Bar Association ("BBA"), I submit the following comments on the report of the Supreme Judicial Court's Ad Hoc Advisory Committee to make revisions to the Code of Judicial Conduct - Canon 3B(9). These comments are the result of careful review and discussion by a work group made up of BBA members from the Administration of Justice, Civil Rights and Liberties, Criminal Law, Delivery of Legal Services, and Litigation Sections, the Executive Committee and Council. The working group included practitioners of civil and criminal litigation and a retired judge.

The principal revision to Canon 3B(9) of the Code[1] recommended by the majority of the ad hoc advisory committee appointed by the SJC addresses a provision that at least some judges believe is subject to more than one interpretation. The proposed revision clarifies that: "A judge does not engage in public comment when he or she speaks during any judicial proceeding in a case or when he or she issues a written memorandum of decision or order entered on the docket of a case." In the proposed commentary that accompanies that revision, the majority explains that "a judge, at any time, may supplement the court record by a written memorandum explaining his or her reasons for judicial action. For example, to educate the public, if he or she deems it appropriate, a judge may choose to issue a written memorandum in order to articulate in greater detail the rationale for the judge's action at the time that action was taken. . ."

The commentary goes on to note that such a memorandum must be "based solely on the facts in the record and reflect the judge's reasoning at the time of the original decision, whether or not that reasoning previously was articulated." As a practical matter, such a memorandum offers a judge the means to respond to criticism in the media directed at a decision previously rendered. Often such criticism is motivated by events that occurred well after the decision was rendered, and therefore the supplemental memorandum would also be issued well after the original decision. The majority's proposed revision engages

[1] Supreme Judicial Court Rule 3:09, Code of Judicial Conduct, Canon 3B(9), currently provides in pertinent part: "Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending Massachusetts proceeding in any court, and shall require similar abstention on the part of court personnel." There are three enumerated exceptions in subsections (9)(a), (b) and (c).

two significant policy questions. First, should a judge respond directly to media criticism of an order that she/he has issued? Second, is a supplemental memorandum issued in a pending case, potentially well after the criticized decision was rendered, the best way to respond to that criticism?

We begin by addressing the second question. We believe that a memorandum of decision issued in a pending case should be reserved for the resolution of a question of fact or law presented by the parties to that case and issued at or near the time the order which it addresses was entered. Some of our reasoning follows.

While the proposed commentary to Section 3B(9) states that a memorandum filed potentially many months after the matter was decided may "educate the public," if such a memorandum issued shortly after the order in question became the subject of critical commentary, the memorandum would undoubtedly be viewed as a response to that criticism. Moreover, the memorandum would also not be perceived as having been issued to inform the parties to the proceeding of the rationale for the court's ruling, nor to explain to an appellate court the trial court's reasoning—the most traditional reasons for writing a decision.

The issuance of such an after-the-fact memorandum would also raise a number of practical questions. Often the order that a judge later wanted to explain in greater detail will have been issued on a day in which the judge heard many similar cases in a limited period of time, e.g., bail review decisions. There may be little likelihood that months later the judge still remembers that particular proceeding or precisely what motivated his/her decision at the time it was rendered. And even if the judge could remember, would the public accept the assertion that this new memorandum reflects the judge's unpublished thinking at the time when the order entered, or simply assume that it is a recently composed response to criticism?

Further, it is unclear whether the opportunity to explain a previous order would be available only to judges before whom the case in question was fortuitously still pending. For example, as a result of the circuit system in use in the Superior Court, a case may often be pending before another judge at the time when the first judge wishes to issue a subsequent memorandum. Normally, a judge loses jurisdiction over a matter that is no longer before her/him, and offering a previously unarticulated rationale for an earlier decision could infringe upon that sound principle, as well as be disruptive to subsequent proceedings in that case. Obviously, if the case were on appeal, the trial court would no longer have jurisdiction to enter any memorandum or order.

It is also unclear whether the issuance of a memorandum of decision months after a ruling would create an opportunity for appeal. One can imagine that a party, disappointed by a ruling on a restraining order or preliminary injunction, might claim a "late" right to appeal after reading a memorandum of decision issued months later that the party believes reflects reliance on a fact not supported by the record or an erroneous application of law.

It appears that a number of unintended consequences could flow from the issuance of a supplemental memorandum explaining an order entered many months earlier, and potentially after many other events have occurred in the life of a case.

The underlying question of whether a judge should be free to respond publicly when criticized by the media about an order entered in a pending or impending case is extraordinarily difficult. It implicates, among many areas of concern, rights of free expression, the independence of the judiciary, the rights of litigants, and the public's

perception of the courts. The 2007 revision to Rule 2.10 of the ABA Model Code of Judicial Conduct now states that "a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter," but we found that only a single state (Michigan) had adopted a provision even approaching the model code's broad right of response. Some members of the BBA were concerned that once the opportunity to respond to the media was made available to judges, some in the media would routinely begin demanding that a judge explain his/her reasoning in any matters that had become controversial, and would unfairly hound a judge who determined that it was not appropriate to respond. Other members believed that a fear that some members of the media would behave inappropriately ought not to trump a judge's right to explain the reasoning underlying a prior order or the public's right to hear the full explanation.

In any event, the BBA believes that it is largely the responsibility of lawyers and the administrative arm of the court to educate the public when a judge's order is being misrepresented in the press. They should be prepared to do this promptly. The BBA notes that Ret. Judge Hiller Zobel's op-ed piece in the Boston Herald was an excellent antidote to the extraordinarily loud and unfair criticism levied by the press in the aftermath of a statutorily-required bail decision last year. Had that same article been written by the judge who had presided over the bail hearing, it might have been less effective. The BBA hopes that the recently announced Media Relations and Outreach Group ("MROG") to be chaired by Justice Greaney will provide the means for tackling this difficult and recurring issue.

In summary, the BBA agrees that the Code of Judicial Conduct may be improved by revisions that clarify whether and in what manner a judge may respond to media criticism of a prior order, but believes that further study of the issue is necessary. The BBA hopes that the newly formed MROG will be able to offer rapid and thoughtful responses to media criticism of orders. Lawyers should also be prepared to step in and educate the public in response to uninformed or unprincipled attacks on a judge for his/her faithful adherence to the law and exercise of his/her best judgment in accordance therewith.

The BBA endorses the addition of the proposed new subsection (d), which permits a judge to respond to criticism directed at his/her conduct and not the substance of a ruling. It agrees with the proposed commentary to this subsection that suggests that it may be preferable for a third party, rather than the judge, to issue the response.

Sincerely,

Anthony M. Doniger
President